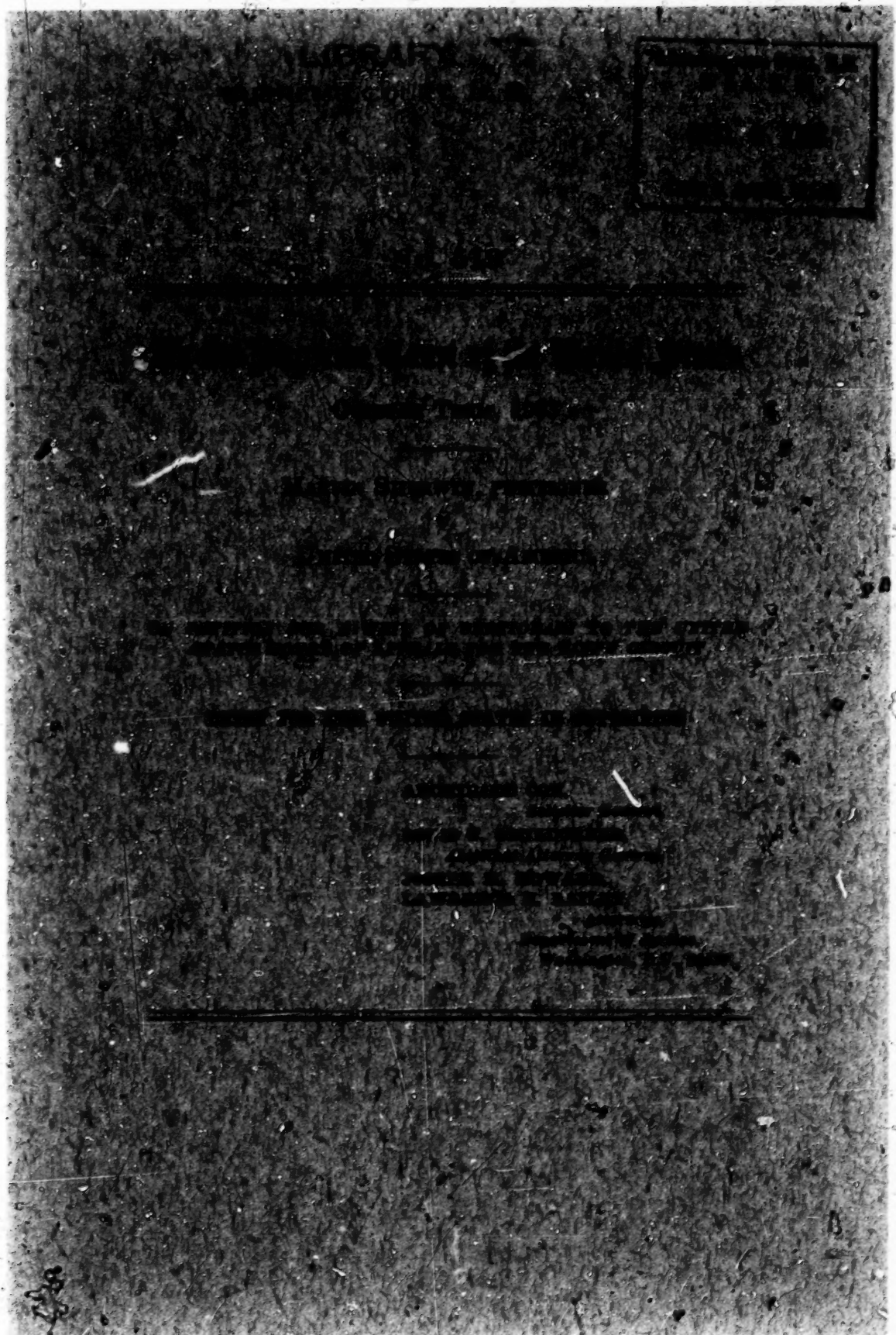

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	14

CITATIONS

Cases:

Agnew v. *United States*, 165 U.S. 36	7
Albrecht v. *United States*, 273 U.S. 1	14
Allen v. *United States*, 164 U.S. 492	7
Berkowitz v. *United States*, 213 F. 2d 468	6
Bloch v. *United States*, 221 F. 2d 786	6, 7
Cramer v. *United States*, 325 U.S. 1	7
Crews v. *United States*, 160 F. 2d 746	7
Debs v. *United States*, 249 U.S. 211	7
Hirabayashi v. *United States*, 320 U.S. 81	14
Jencks v. *United States*, 353 U.S. 657	11
Killian v. *United States*, 368 U.S. 231	11
Koehler v. *United States*, 189 F. 2d 711, certiorari denied, 342 U.S. 852	7
Mann v. *United States*, 319 F. 2d 404	8, 9, 14
Morissette v. *United States*, 342 U.S. 246	6, 7
Myres v. *United States*, 174 F. 2d 329	7
Rosenberg v. *United States*, 360 U.S. 367	11
Roviaro v. *United States*, 353 U.S. 53	11
Sinclair v. *United States*, 279 U.S. 263	14
United States v. *Noveck*, 273 U.S. 202	14
Wardlaw v. *United States*, 203 F. 2d 884	6

714-554—63——1

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):
Sec. 7201 ..... 2, 3, 13, 14
Sec. 7206 3

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 519

MARVIN SHERWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. ii-xxxi) is reported at 320 F. 2d 137. The District Court filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1963 (Pet. xxxii). Rehearing was denied on August 8, 1963 (R. 57).[1] By order of Mr. Justice Goldberg, dated September 3, 1963, the time

[1] The record certified to this Court consists of the pleadings in the District Court and the proceedings in the Court of Appeals (Vol. I), and the transcript of the trial (Vols. II-VII). References to Vol. I will be designated "R." References to the transcript will be designated "Tr."

for filing the petition for a writ of certiorari was extended to October 7, 1963. The petition was filed on October 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury that it might infer that petitioner intended the natural and probable consequences of his conscious acts.

2. Whether the Government was required to produce the report of a revenue agent, who had freely testified as a witness for the defense and whose workpapers were already in the hands of the defense.

3. Whether the trial court committed fundamental error in giving an instruction on wilfulness which had been specifically requested by petitioner.

4. Whether the trial court erred in not giving an instruction on a claimed defense theory.

5. Whether charges of attempted tax evasion (26 U.S.C. 7201) may be joined with charges of knowingly making and subscribing false returns (26 U.S.C. 7206(1)) where both sets of charges arise from the same transactions.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) Declaration under penalties of perjury.

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7206.)

STATEMENT

On July 14, 1961, an indictment was returned in the Northern District of California, charging petitioner in the first three counts with willfully attempting to evade income taxes for the years 1954, 1955 and 1956, in violation of Section 7201 of the Internal Revenue Code of 1954. In the last three counts petitioner was charged with making and subscribing joint income tax returns for the same three years, verified by written declarations that they were made subject to the penalties of perjury, knowing that they were materially false, in violation of Section 7206(1) of the Internal Revenue Code of 1954. (R. 2–7.)

The amounts alleged in the first three counts of the indictment were as follows (R. 3–5):

TAXABLE INCOME

Year	Reported	Corrected	Additional
1954	$21,221.01	$33,993.64	$12,772.63
1955	20,796.96	32,664.03	11,867.07
1956	22,986.79	35,354.28	12,367.49
Totals	65,004.76	102,011.95	37,007.19

TAX

Year	Reported	Corrected	Deficiency
1954	$5,743.60	$11,396.82	$5,653.22
1955	5,582.84	10,732.01	5,149.17
1956	6,414.98	12,007.37	5,592.39
Totals	17,741.42	34,136.20	16,394.78

After a jury trial lasting over two weeks, petitioner was found guilty on all counts. (R. 47–48.) On May 25, 1962, the District Court imposed concurrent sentences of imprisonment for one year on each of the six counts and a fine of $1,000 on count one. (R. 36.) The Court of Appeals affirmed. (Pet. App. xxxii.)

Petitioner's returns were prepared by an accountant from handwritten sheets furnished him by petitioner; the sheets did not contain any of the unreported income. (Tr. 280–288.) For the year 1954, petitioner did not report income from nine different sources. This income came to him through 27 items of payment, which, as the court below stated (Pet. App. v–vi), were of such a character that it would be most un-

likely that petitioner would forget them. For the years 1955 and 1956, the evidence of unreported income was similar in amount and source. (Tr. 448–475.) Pursuant to a request, petitioner had furnished the investigating agent with bank statements from two bank accounts, one of which he stated was for his law practice and the other for his personal household accounts. When asked by the agent, petitioner had denied that he had any bank accounts other than these two. The evidence showed that in fact petitioner had a number of other bank accounts, some of which were used to deposit unreported receipts. (Tr. 348–359, 372, 476–484, 759–777, 790–796.)

Petitioner, a practicing attorney for many years, was not uninformed in tax matters. While in the Legislative Assembly of the State of California from 1945 to 1953, he was a member of its Revenue and Taxation Committee which writes all tax legislation for the State; he was also Chairman of its Ways and Means Committee. (Tr. 848–851.) For the years 1945 and 1946 he prepared and filed partnership returns for the Tarman-Sherwin partnership. (Tr. 684, 732.) He admitted that he understood the distinction between capital gains and ordinary income. (Tr. 735–736.) He prepared a memorandum for the Bechtel Corporation's accountant on the benefits of lower taxation brackets for multiple corporations. A similar memorandum was prepared by him during the prosecution years for the Beresa corporation. (Tr. 233–237, 697–703.)

ARGUMENT

1. At trial petitioner objected to the following portion of the trial court's charge (Tr. 1100):

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

His primary contention before this Court is that this instruction invited the jury to infer "intent to knowingly and wilfully evade taxes from the mere fact that income was omitted" from petitioner's returns and that it improperly created a presumption on the issue of intent (Pet. 5). In these respects the decision below is said to be in conflict with *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9), and *Morissette* v. *United States*, 342 U.S. 246, respectively.

We believe this portion of the instruction was both correct and consistent with the decisions cited by petitioner. The instruction in this case eliminated the only two failings of the instructions condemned in *Wardlaw* v. *United States*, 203 F. 2d 884 (C.A. 5); *Berkovitz* v. *United States*, 213 F. 2d 468 (C.A. 5);[2]

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[2] The instruction in *Berkovitz* and *Wardlaw* stated:

"The presumption is that a person intends the natural consequences of his conscious acts, and a natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intends to defeat the tax."

and *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9).[3] First, the instruction given by the District Court eliminated any reference to a *presumption* of a guilty intent; it stated only what inferences the jury "may draw" and even limited these by adding, "unless the contrary appears from the evidence."[4] Second, the instruction here did not state that the specific intent to evade taxes could even be inferred from the mere omission of items of gross income.

The instruction simply repeated what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his acts.[5] The instruction is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed. To this intent that certain items should not be taxed, one must add knowledge that they were taxable in order to find the element of willful intent to evade taxes.

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[3] The instruction in *Bloch* stated (p. 788):

"The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intends to defeat the tax."

[4] Thus, this Court's decision in *Morissette* v. *United States*, 342 U.S. 246, is not in point.

[5] See, *e.g.*, *Allen* v. *United States*, 164 U.S. 492, 498; *Agnew* v. *United States*, 165 U.S. 36, 53; *Debs* v. *United States*, 249 U.S. 211, 216; *Cramer* v. *United States*, 325 U.S. 1, 31; *Crews* v. *United States*, 160 F. 2d 746, 750 (C.A. 5); *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8); *Koehler* v. *United States*, 189 F. 2d 711, 714 (C.A. 5), certiorari denied, 342 U.S. 852.

Whether it is reasonable to infer that the defendant knew that the omitted items of income were *taxable* depends upon all the evidence, including the defendant's education and experience, his knowledge of tax law, the size and character of the income, and any conduct suggesting or belying guilty knowledge. The instructions also made this clear. Unless the contrary appears from the evidence, the Court charged, "the jury *may* draw the inference that the accused intended all the consequences which one *standing in like circumstances and possessing like knowledge* should reasonably have expected to result * * *". (Emphasis supplied.) These words were well attuned to the evidence. There was proof that large amounts of income were withheld, that petitioner submitted false records to his accountant, that he attempted to conceal bank accounts from a revenue agent, and that he was a trained lawyer with experience in tax matters. Manifestly, it was these "acts" and "circumstances" and "knowledge" in the light of which the instruction permitted the inference of a guilty intent to be drawn.

Although we submit that this portion of the instruction given above was entirely correct and certainly harmless in light of the voluminous accompanying instructions, the decision below conflicts, at least on the surface, with a recent decision of the Fifth Circuit in *Mann* v. *United States*, 319 F. 2d 404. There, an identical instruction, given in a nearly identical context of accompanying instructions, was held to be plain error on the ground that it created an unwarranted presumption of a specific intent to

evade taxes and thereby shifted the burden of disproving this element of the crime to the defendant. Despite the surface conflict, we doubt whether there is any true inconsistency or need for further review. Identical instructions upon circumstantial evidence of intent may take on a different significance in the context of different trials. There was little similarity in the evidence at these two trials. There is, therefore, no necessary inconsistency in the rulings and no unfairness to this petitioner in denying further review of his conviction even though Mann's conviction was reversed in the Fifth Circuit. For the same reason, it is far from clear that review on certiorari would give further guidance to the lower courts in an area where the general principles are already well established. Accordingly, we have refrained from acquiescing in a grant of certiorari in this case, and have filed a conditional petition for certiorari in *Mann* v. *United States, supra,* asking that the latter case be reviewed only if the Court grants certiorari in the instant case.

2. There is no merit to petitioner's other contentions of error at his trial.

a. Petitioner contends (Pet. 6–7) that the trial court erred in not turning over to the defense a report prepared by Revenue Agent Neilands. The argument is without merit.

Neilands was not the investigating agent in petitioner's case, nor did he testify for the Government at the trial. While investigating a taxpayer named Tarman, he had audited the returns of a partnership

between Tarman and petitioner and prepared a report for his superiors. (Tr. 545, 561.) Shortly after the Government had begun to present its case, counsel for petitioner notified the trial judge that he intended to call Neilands as a defense witness in order to testify on the value of certain partnership properties, and he asked for production of the report on the ground that Neilands would have to resort to it to refresh his memory. (Tr. 65a–65d.) The trial judge refused the request at that time, on the ground that the report had no evidentiary value standing alone, but he made it clear that he would change his decision if petitioner's need for the report became clear later in the trial.[6] (Tr. 65d–65g.)

Eventually Neilands appeared as a defense witness and testified fully and freely as to the value of the partnership properties in which the defense was interested. (Tr. 543–586.) Furthermore, the defense had been given copies of the work-sheets and schedules which Neilands had prepared in the course of writing his report, and these were used in the examination of Neilands (Tr. 547–552) and later in the examination of the defense accountant, Moran (Tr. 869–870, 896–902, 930, 940–941, 943–944, 951–953). The request for the report was twice renewed, but petitioner was never able to show any need for it. (Tr. 526–530, 561–562.) There was no need to refresh Neilands' memory as to the results of his inves-

[6] Although the petition seems to imply that the ruling was based on privilege (Pet. 6, 7), the trial judge specifically stated that he was not deciding the question of privilege (Tr. 65b, 65g).

tigation—his work papers served that purpose completely. There was no suggestion that he required additional corroboration in any respect, or that he was hostile to the defense and required impeachment.

It is thus clear from this record that petitioner had no need for Neilands' report, since the express purpose for which he desired it was already fulfilled by the work papers and by Neilands' own accurate recollection. Cases like *Jencks* v. *United States*, 353 U.S. 657, and *Roviaro* v. *United States*, 353 U.S. 53, upon which petitioner relies, are simply not in point, for there the Government was required to disclose information which might have been helpful to the defense in impeachment of Government witnesses. This case more closely resembles *Rosenberg* v. *United States*, 360 U.S. 367, 371, in which the information sought from the Government was already available to the defense from another source. See also *Killian* v. *United States*, 368 U.S. 231, 243.

b. It is urged (Pet. 7–10) that two passages in the Court's charge to the jury in effect permitted petitioners to be found guilty of wilful attempted tax evasion on the basis of negligence alone. But the first of these two passages was the first paragraph in petitioner's own Requested Instruction No. 19,[1] which the

[1] Since petitioner's requests for instructions do not appear in the record, we have lodged a copy with the office of the Clerk of this Court. The pertinent request reads as follows:

Instruction No. 19

"SUBJECT: Wilfulness.

"You are instructed that in common, everyday speech, 'wilful' denotes an act which is intentional, knowing or voluntary,

trial judge informed counsel he would give (Tr. 1032, 1057), and which he did give verbatim (Tr. 1108–1109) without objection by petitioner (Tr. 1129–1131). Nor is petitioner in any better position to criticize the second passage (Tr. 1115–1116), since the language of which he complains there simply paraphrases language already given, at his own request, in the previous passage and, in any event, makes sufficiently clear that the defendant could only be convicted if "he intended to evade the tax" (Pet. 8).

Furthermore, the context in which these passages occurred was such that the jury could have been left in no doubt as to the necessity for a finding of wilful and intentional attempts on the part of petitioner to evade taxes which he well knew to be due and owing.

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as distinguished from accidental, but when it is used in a criminal statute, where one of the elements is a specific intent to defraud, it has a somewhat different meaning. It generally means an act done with a bad purpose, without justifiable excuse. The word 'wilful' is also used to characterize a thing done without ground for believing it is lawful.

"You are instructed that the thing done is not necessarily and under all circumstances required to be lawful. It is sufficient to exculpate and exonerate a defendant if it is honestly believed to be lawful. Or to put it conversely, it is unlawful if it is done without grounds for believing in its lawfulness.

"If an act is done in good faith, based upon an actual belief of a defendant, even if such belief is a mistaken one, or a negligent one, or if such defendant is in ignorance of either facts or law rendering it unlawful; and, if you believe that the defendant, Marvin Sherwin, honestly made a mistake, honestly was negligent and honestly was ignorant of the facts or ignorant of the law, you will then determine that his conduct in doing what he did was not wilful.

"Authority: *U.S.* v. *Murdock*, 290 U.S. 389."

The jury was repeatedly told, in various ways, that they must find a deliberate intent on petitioner's part to conceal income which he knew to be subject to tax. (Tr. 1099–1100, 1106–1110, 1115–1118, 1121–1122, 1123.) As the Court of Appeals remarked (Pet. App. xxi), the jury could not have been misled on the subject of wilful intent in view of the "massive repetition" of instructions on the subject.

c. There is no merit to the contention (Pet. 10–12) that the trial judge refused to instruct on a theory of defense for which there was support in the record. Petitioner proposed an instruction which would have allowed the jury to find that in 1951 he had incurred an operating loss, which could be carried forward to the prosecution years of 1954 to 1956, in connection with a transfer of the so-called "Plaza Building" from the partnership to petitioner's partner, Tarman. However, the evidence was unequivocal that no loss had then been realized by petitioner because the respective rights of petitioner and Tarman in this property were still in dispute; as to these rights litigation had not been concluded. This was admitted by the accountant for the Tarman-Sherwin partnership (Tr. 339), by another accountant engaged in connection with the litigation pending in the state court (Tr. 946), and apparently by petitioner himself (Tr. 622, 630). Thus, there was no evidence in the record warranting an instruction that petitioner had incurred a loss from a final disposition of the "Plaza Building".

d. Since there was no error with respect to the first three counts charging tax evasion under Section 7201 of the Internal Revenue Code of 1954, and the sen-

tences on all counts are concurrent, there is no basis for petitioner's contention (Pet. 12–13) that this Court should review petitioner's conviction under the last three counts of the indictment which charge violations of Section 7206(1) of the Internal Revenue Code of 1954. *Hirabayashi* v. *United States*, 320 U.S. 81, 105; *Sinclair* v. *United States*, 279 U.S. 263, 299.

Moreover, Congress has the power to punish each step leading to the consummation of a transaction which it has power to prohibit, and to punish also the completed transaction. *Albrecht* v. *United States*, 273 U.S. 1, 11. Accordingly, petitioner's conviction for tax evasion and for falsely subscribing, under penalties of perjury, his income tax returns for the same years was proper. Cf. *United States* v. *Noveck*, 273 U.S. 202, 206.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied. If this Court believes that the conflict with the Fifth Circuit's decision in *Mann* v. *United States*, 319 F. 2d 404, warrants further review, we suggest that the present petition should be granted but limited to the first question presented.

Respectfully submitted.

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